No. 86.

Brf. of Perry for P. C.

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Supreme Court of the United States

THE HOME FOR INCURABLES
Plaintiff in Error

vs.

THE CITY OF NEW YORK
Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

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EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

THE HOME FOR INCURABLES, Plaintiff in Error, vs. THE CITY OF NEW YORK, Defendant in Error.	No. 86.

This case comes before this Court by virtue of a writ of error, directed to the Supreme Court of the State of New York, allowed by Mr. Justice Peckham on April 17, 1901 (fols. 21–23).

The plaintiff in error began a proceeding in the Supreme Court of the State of New York, in the manner prescribed by the statutes of that State, to reduce an assessment for a local improvement (a sewer) which had been levied against and made a lien upon real estate owned by it (fols. 1–4). That Court, after taking the evidence of the parties (fols. 5–8), denied the relief asked (fol. 9). An appeal was thereupon taken to the Appellate Division of that Court, which affirmed the denial (fols. 13–14). A further appeal was thereupon taken to the Court of Appeals (fol. 15), which Court likewise affirmed the denial (fols. 17–18), and remitted the proceeding to the Supreme Court (C., p. 1), where final judgment was entered against the plaintiff in error (fol. 20).

In none of the three courts was an opinion written (fols. 12–16), but the Chief Judge of the Court of Appeals certified (fols. 32–33) that the plaintiff in error

> " claimed in the courts of this State that the im-
> " position of all or a part of the assessment on its

"lands as set forth in the record herein was in "violation * * * of the provisions of the "Fourteenth Amendment of the Constitution of "the United States and constituted a taking of "property without due process of law; that the re- "spondent in this proceeding contended that the "said assessment was neither in whole nor in part "in violation of the * * * Constitution of "the United States: * * * that this Court de- "cided * * * that the assessment complained "of was valid and without error as to each and "every part thereof."

The facts out of which the case arose.

A sewer was laid in a street in New York City, which was in part adjacent to property owned by the plaintiff in error, and its lots were assessed therefor $4,657.88 for its share thereof (fol. 6). The sewer was laid pursuant to a contract made by the City with private contractors. As the work progressed the City from time to time paid the contractors varying amounts on account. The first of these payments was made May 2, 1896; the final payment was made December 2, 1897 (fol. 6). The assessment was levied January 22, 1900 (fol. 5).

The total amount of the assessment levied, all of which was assessed locally, was $74,349.94, made up of the following items:

Contract price	$58,840 08
Surveying	5,380 53
Inspecting	2,280 00
Interest	*7,837 33*
Binding assessment roll	12 00

(fol. 6).

The interest item is the only one in question.

All payments to the contractors were made from a fund in the City Treasury, known as the "Street Improvement Fund," which is made up from two sources, *i. e.*, from moneys received by the City from property owners in payment of all local assessments, and from moneys realized

from the sale of street improvement bonds (fols. 6–7). For the two years during which payments were being made to the contractors on account of this sewer, the greater part of this fund (about 60 per cent.) was derived from moneys paid to the City for assessments, the remainder (about 40 per cent.) represented the proceeds of sales of bonds (fols. 6–7).

The City paid no interest for the money it received; it paid only 3 per cent. interest on the bonds from which the interest bearing portion of the fund was realized.

The interest item in the assessment consists of interest on the various amounts advanced to the contractors, calculated at the rate of 6 per cent., although, as we have shown, the City paid no interest whatever for 60 per cent. of the amount so advanced, and only 3 per cent. for the remainder.

The City seeks to justify this action by the statement that in making up the assessment as it did it followed the provisions of § 946 of its charter (Ch. 378 of the Laws of New York of 1897), which reads as follows:

> "All assessments shall be made by the board
> " of assessors on the following certificates:
>
> "1. The officer or head of the board or depart-
> " ment charged with the execution of the work in
> " question shall certify to the board of assessors
> " the total amount of all of the expenses which
> " shall have been actually incurred by the City of
> " New York on account thereof.
>
> "2. The Comptroller shall certify to the board of
> " assessors the amount of interest at the *legal rate*,
> " upon the several installments advanced or pay-
> " ments made on account of such work from the
> " time of such payment or advances by the City to
> " a date sixty days after the date of such certificate.
> " Thereafter the board of assessors shall assess upon
> " the property benefited, in the manner authorized
> " by law, the aggregate amount of such certificates,
> " or such proportion thereof as is authorized by
> " law."

General statement of errors assigned (fols. 28, 29).

The plaintiff in error contends:

(1.) That the assessment should not exceed the actual cost to the City of the improvement, whether that cost be of money, material or labor, and that in *charging six per cent. interest* on *all* moneys used to pay the contractors, *when it paid* only three *per cent.* for part thereof, and no *interest* for the remainder, the City committed an illegal act.

(2.) That the section of the City Charter above quoted in authorizing such action violates the Fourteenth Amendment to the United States Constitution in that it sanctions a taking of property without due process of law, as nonpayment of the assessment as levied subjects the property owner to loss of his land by sale by the City (Charter, § 1,027, &c.).

ARGUMENT.

I.

This Court has jurisdiction to review the constitutional question raised by the plaintiff in error.

Although no formal motion has been made to dismiss the appeal for want of jurisdiction, it is fair to assume that question will be raised.

That this question of jurisdiction, at first blush, seems serious, we concede. But we are confident an examination of the record, in the light of the statutory situation in New York governing proceedings of the character of that at bar, with the guidance of the decided cases, will sustain our contention that this Court has before it a record which confers upon it jurisdiction to examine the merits of the question presented.

(*a.*) The New York Statutes.

Chap. 398 of the laws of New York for 1897 contains the New York City charter in force at the time of the institution of this proceeding. In respect of the questions here involved it is a mere re-enactment of the former charter of 1882.

The relief sought by the plaintiff in error was the reduction of an assessment for a local improvement. § 958 of that charter provides:

> "No suit or action in the nature of a bill in equity "or otherwise shall be commenced for the vacation "of any assessment in said city, or to remove a "cloud upon title; but owners of property shall be "confined to their remedies in such cases to pro- "ceedings under this title."

§ 959 contains the "remedy" referred to, which is that

> "The party aggrieved thereby may apply to a "Justice of the Supreme Court in Special Term or "in vacation, who shall thereupon, upon due "notice to the Corporation Counsel" hear the allegations and proof and proceed to grant relief.

These sections show that nothing that corresponds to a carefully drawn declaration or complaint or bill in equity is permissible. In fact, no written pleading of any kind is necessary. A mere application to the Court after notice is all that is required. In the case at bar the proofs were taken under stipulation before the application was made (fols. 5–8). When the application was made it was accompanied by a "petition" (fols. 1–5), so-called. No such petition is provided for or authorized by the statute and it is in fact more in the nature of a bill of particulars of the complainant's contention than anything else, and could well have been dispensed with. No authority can be found for the assertion that it must comprehend all the complainant's grounds of relief, or that complainant would be precluded from claiming relief on grounds other than those therein stated. The field of argument was as wide open as though no "petition" had been filed.

The petition in this case said, among other things, that so much of the legislation (Charter, § 946, *supra*) as authorized the interest charge complained of, "is in violation "of the Constitution of the State of New York, in that "said portion of said act authorizes the taking of private "property without just compensation, and said portions of "said act authorizes an unlawful exercise of the power of "taxation." It did not make special reference to the fourteenth amendment to the United States Constitution.

But on the "hearing," in the State Supreme Court, when under the charter that Court heard the "proofs "and allegations" (Charter, § 959), the claim of protection under the fourteenth amendment was alleged and asserted, and it was reasserted on the appeal to the Appellate Division and on the appeal to the Court of Appeals, and Chief Judge Parker certifies that

> "it was claimed in the courts of this State that the "imposition of all or part of the assessment * * * "was in violation * * * of the fourteenth "amendment of the Constitution of the United "States, and constituted a taking of property with-"out due process of law" (fol. 32).

In short, there was nothing in the State statutes that provided or required that the claim of the protection of the fourteenth amendment or any other claim of legal right should be made other than orally as part of the allegations on the hearing, and having been so made, there was no way of having that fact appear in the record (there having been no opinion rendered by any of three courts which have considered the question) other than by a certificate of the Judge.

That certificate does not inject new matter, nor does it import an afterthought, into the record. It simply reproduces the situation presented to all of the State courts, and makes clear matter of which, owing to the peculiar provisions of the State statute, the record does not directly speak.

(*b.*) As to the decisions of this Court on the question of jurisdiction as affected by a Judge's certificate.

In *Johnson* vs. *Risk*, *137 U. S., 300, 307*, it was said:

> "The defendant below demurred upon two general grounds, one of which involved the construction of the bankrupt act of March 2, 1897, and the other the bar of the Statute of Limitation of the State of Tennessee. So far as we are advised no opinion was given by the Supreme Court of that State upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the Court proceeded. Inasmuch as one of the defenses called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decision of the highest court of the State (Gormley *vs.* Clark, 134 U. S., 338-348), *the plaintiff in error, if he wished to claim that this cause was disposed of by the decision of a federal question, should have obtained the certificate of the Supreme Court to that effect*, or the assertion in the judgment that such was the fact."

The case at bar presented two questions in the State court, one the constitutional question, and the other relating to procedure, and it was to obviate the embarrassment presented in *Johnson* vs. *Risk* that we procured the statement in the certificate that this case was not determined on the question of procedure (fol. 33).

In *Parmalee* vs. *Lawrence*, *11 Wal., 36, 39*, it was said:

> "The office of the certificate" (of the State court Judge) "as it respects the federal question, is to " make more specific and certain what is too gen- " eral and indefinite in the record, but it is incom- " petent to originate the question, within the true " construction of the 25th Section."

In *Meyer* vs. *City of Richmond*, *172 U. S., 82, 92*, the Court, after reviewing a number of authorities, said:

> " In all of these cases the federal question was not " presented in any way to the lower Court, nor to " the higher Court until after judgment. It is not, " therefore, decided that a presentation to the lower " Court at some stage of the proceeding and in ac- " cordance with its procedure, and a presentation

> " to the higher Court before judgment would not
> " be sufficient."

In *Columbia Water Power Co.* vs. *Columbia Electric Co.*, 172 U. S., 475, it was said (p. 488):

> " Where the validity of a treaty or statute of the
> " United States is raised, and the decision is against
> " it, or the validity of a State statute is drawn in
> " question, and the decision is in favor of its valid-
> " ity, this Court has repeatedly held that, if the
> " federal question appears in the record and was
> " decided, or such decision was necessarily in-
> " volved in the case, and the case could not have
> " been determined without deciding such question,
> " the fact that it was not specifically set up and
> " claimed is not conclusive against a review of such
> " question here."

In *Kaukauna Water Power Co.* vs. *Green Bay Co.*, 142 U. S., 254, it was said:

> " Notwithstanding the inhibition of the Consti-
> " tution is not directly put in issue by the plead-
> " ings, nor directly passed upon in the opinion of
> " the Court, it is evident that the Court could not
> " have reached a conclusion adverse to the defend-
> " ant company without holding either that none of
> " its property had been taken or that it was not
> " entitled to compensation therefor, which is equiv-
> " alent to saying that it had not been deprived of
> " its property without due process of law. This
> " Court has had frequent occasion to hold that it is
> " not always necessary that the federal question
> " should appear affirmatively on the record, or in
> " the opinion if an adjudication of such question
> " were necessarily involved in the disposition of
> " the case by the State court."

The plaintiff in error contends:

(1.) That the practice prescribed by the statute rendered it proper to raise the federal question by allegations at the hearing.

If an opinion had been rendered this Court could have examined that.

> *Gross* vs. *U. S. Mortgage Co.*, 108 U. S., 477;
> Rule IV. of the New York Court of Appeals
> Rules.

If that opinion had indicated that the federal question was considered by the State court, this Court could have assumed jurisdiction. In default of an opinion the only recourse was to a certificate. Plaintiff's right to a review surely cannot be made to depend upon the writing or failure to write an opinion in the State court.

(2.) The federal question having, under the State practice, been properly raised on the argument, the certificate of the Judge to that effect did not originate that question, but reduced to record form that which had been and at the foundation of the case from its first presentation to the lowest State court.

(3.) The federal question was necessarily involved in the disposition of this case by the State courts.

Under the rule stated in *Columbia Water Power Co.* v. *Columbia Electric Co.*, 172 U. S., 475, and *Kaukauna Water Co.* vs. *Green Bay Co.*, 142 U. S., 254 (already cited), this is sufficient to give this Court jurisdiction.

That it was so involved is shown by our argument under Point II. (*infra*).

Before leaving this jurisdictional question we wish to advert to the case of *The New York Central Railroad against the City of New York*, decided by this Court in June last

In that case a proceeding was brought to vacate an assessment for a local improvement levied by the City of New York. The plaintiff was unsuccessful in the State courts and brought the case here by writ of error, which writ was dismissed.

That case will doubtless be relied upon by the defendant in error. We submit it is distinguishable from the case at bar. In that case an opinion was written in one of the State courts, to which allusion is made in the opinion of this Court; and it appears from the opinion of the State court that that Court decided the case on the question of the want of power under the statute to grant the relief asked in the form of proceeding adopted; in other words

there was a question of State procedure which was decided adversely to the plaintiff in error. This is apparent from the following extract from the end of the opinion in that case (which will be found at folio 71 of that received in this Court).

" The Courts below were therefore right in determining " that the special remedy invoked by the petitioner had " no application to the case which he had presented."

In the case at bar we have the certificate to the effect that the question of procedure though raised was decided favorably to the plaintiff in error, so that question did not form the ground for its defeat.

Again, in the *New York Central* case there is no explicit statement in the certificate that the federal question was raised. The appellant's brief in the State court is certified. That is all. Here we have the statement of the Judge that the federal question was raised and decided adversely to the plaintiff in error.

II.

(*A.*) The constitutional question was necessarily involved in the disposition of this case by the State courts.

(*B.*) In upholding the assessment the State courts deprived plaintiff in error of a right guaranteed by the fourteenth amendment.

(*A.*)

The certificate shows that the State courts upheld the plaintiff in error on the question of procedure.

This left only the question of the validity of the assessment.

The statement of facts made at the beginning of this brief shows the situation. The question is in very small compass. It is, "Could the City charge the property

owner, as part of the cost of the improvement, interest at the rate of 6 per cent. on the money it advanced to the contractor when it paid no interest at all for part of this money and only 3 per cent. for the balance?"

Obviously the answer to this question involves the extent of the City's power in levying local assessments, and co-relatively the rights of the property owners assessed, property rights of which he cannot be divested without due process of law; and this was the case presented and argued in all of the State courts.

(*B.*)

In upholding the assessment the State courts deprived plaintiff in error of a right guaranteed by the fourteenth amendment.

The record (fol. 8) shows that this assessment included a charge of $7,837 for interest on the advances made to the contractor calculated at the rate of 6 per cent. (fol. 8).

But on over 60 per cent. of the fund from which this was paid the City paid no interest; on the remaining 40 per cent. it paid only 3 per cent. (fol. 8). The real cost in interest to the City was therefore only about $1,567.46, upwards of $6,000 less than the amount included in the assessment.

If the Legislature has the right to say that the City shall include in any assessment an item for interest on advances made contractors at the rate of 6 per cent. when in fact the City only pays 3 per cent. for the money so advanced, it has an equal right to say that the rate shall be 60 per cent. or 600 per cent.

This is not taxation, it is confiscation. And the levying of such an assessment by the City which is the first step towards its acquiring the property, in case of nonpayment, is clearly a taking of property without due process of law.

The whole theory upon which local assessments are sustained is that the property assessed is to recieve a benefit corresponding with the amount assessed and that this is

to be paid to meet the cost and expense of the improvement.

Cooley on Taxation (2d Ed.), 606.
2 Desty on Taxation, 1237–1238.
25 A. & E. Ency. Law, Topic Taxation, p. 496.
In re Meade, 74 N. Y., 216–221.
1 Hares Am. Const. Law, 310.
French *vs.* Barbour Asphalt Co., 181 U. S., 324.
Norwood *vs.* Baker, 172 U. S., 269.

What compensation by way of benefit did this property receive from this excess interest charge? Absolutely none.

The only cases in which it has ever been held that the assessment could exceed the actual cost of the work, are cases where the work was part of a general scheme of improvement.

Parsons vs. *District of Columbia, 170 U. S., 45*, illustrates that class of cases (see pp. 56–57 of the Opinion).

There the excess above the actual cost was sustained on the theory that the excess represented a share in a fund which was to be raised to keep in repair, &c., the system of which the special assessment (a water main) formed a part, and did not go into the general treasury of the District.

There is no such question in this case. Here the excess represents an actual profit to the City to the benefit of the citizens at large, at the expense of the plaintiff in error.

That an assessment containing such an item is, to the extent of the excess above the cost, invalid, and that the loss of property from a failure to pay the same, is a deprival of such property without due process of law, is apparent.

The mere statement of the proposition is the most cogent argument in its support.

Extended quotations from or citations of authorities seem unnecessary.

The State ex rel. vs. *The City of Elizabeth*, 37 New Jersey Law, 142; and *Drake* v. *Austin*, 47 Cal., 353-358, are selected for reference because they both involve the question of the including in an assessment roll of an interest item which the municipality was not itself obliged to pay and they both condemn such item.

In this Court *Norwood* vs. *Baker*, 172 U. S., 269, is in point. The head note states:

> "The principal underlying special assessments
> " upon private property to meet the cost of public
> " improvements is that the property upon which
> " they are imposed is peculiarly benefitted, and
> " therefore that the owners do not in fact pay any-
> " thing in excess of what they receive by reason of
> " such improvement.
>
> " The exaction from the owner of private prop-
> " erty of the cost of a public improvement in sub
> " stantial excess of the special benefits accruing to
> " him is to the extent of such excess, a taking
> " under the guise of taxation of private property
> " for public use without compensation."

French vs. *The Asphalt Co.*, 181 U. S., 324, if it differ from the Norwood case at all, does not differ on this proposition.

These two cases have been so recently decided by this Court, and the whole field of assessment for local improvements is so exhaustively treated in the opinions there rendered, that little remains to be said.

It is to be noted that in so far as there may be a difference of opinion on this subject it relates to the question of the method of ascertaining the benefit conferred by the improvement so as to properly apportion the cost. They all assume that *the cost of the improvement* is the thing that is to be apportioned. Our complaint is not that the cost of the improvement is not properly apportioned, but that there is included in the cost an item that forms no part thereof and from which we derive no benefit.

III.

The case should be remanded to the State court, with instructions to deduct from the amount of the assessment all interest in excess of that actually paid by the City.

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